90-1790 (1)

Supreme Court, U.S.
FILED
MAY 15 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

TOMISLAV SAVIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Bogdan Martinovich
Of Counsel
RAY & GLICK, LTD.
611 South Milwaukee Avenue
Libertyville, Illinois 60048
(708)680-9600
Attorneys for Petitioners

QUESTIONS PRESENTED

I.

Is Seventh Circuit's reversal of the judgment of the District Court in direct conflict with the decisions of the Illinois Supreme Court in its interpretation of the Illinois Structural Work Act, Illinois Revised Statutes Chapter 48, paragraphs 60-68.

II.

Did the Seventh Circuit engage in impermissible fact finding when it redetermined credibility and weight of testimony in ruling that the District Court's fact finding was clearly erroneous.

LIST OF PARTIES

The parties to the proceedings below were petitioners, the respondents and a third party defendant not the subject matter of this petition:

The petitioner is Tomislav Savic.

The respondent is the United States of America.

The third party defendant is Kovilic Construction Company, Inc., an Illinois corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINION BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

THE REASONS FOR GRANTING THE WRIT .7

I. REVIEW IS NECESSARY TO PREVENT THE SEVENTH DISTRICT COURT FROM IGNORING ILLINOIS LAW AS IT RELATES TO THE ILLINOIS STRUCTURAL WORK ACT AND PREVENT THE APPLICATION OF THE ACT IN FEDERAL TORT CLAIMS CASES WHICH ARE IN DIRECT CONFLICT WITH THE DECISIONS OF THE ILLINOIS SUPREME COURT 7

II. THE COURT OF APPEALS MISAPPREHENDED AND MISAPPLIED THE CLEARLY ERRONEOUS STANDARD OF FEDERAL RULES OF CIVIL PROCEDURE 52(a), 28 USCA 11

CONCLUSION 19

APPENDIX

TABLE OF AUTHORITIES

Anderson v. City of Bessemer City,
105 S.Ct. 1504 (1985).....13, 19

Cannon v. United States, 328 Fed.2d
763,(7th Cir. 1964) 11

Chance v. City of Collinsville,
112 Ill.App.3d 6, 11, 445 N.E.2d
39, 42 (1983).....10

Emberton v. State Farm Mutual Auto
Insurance Company, 71 Ill.2d 111,
117, 373 N.E.2d 1384, 1350 (1978).....9, 10

Hollis v. R. Latora Construction,
Inc., (1985) 108 Ill.2d 401, 410,
92 Ill.Dec. 494, 485 N.E.2d 4.....18

Johnson vs. Commonwealth Edison
Company, 88 Ill.Dec. 449,
453 N.E.2d 1057 (1st Dist.1985).....10

Kochan v. Commonwealth Edison
Company, 123 Ill.App.3d 844, 848,
79 Ill.Dec. 367, 463 N.E.2d 921.....16

Larson v. Commonwealth Edison
Company (1965), 33 Ill.2d 316,
321-22, 211 N.E.2d 247, 451,.....7, 8
10, 11

Miller v. DeWitt, 37 Ill.2d 273,
266 N.E.2d 630, 39 (1967).....10, 11

Orvis v. Higgins, 180 F.2d 537
(CA 2 1950) 16

People v. Gould, 345 Ill. 288, 323,
178 N.E. 133, 148 8

Phillips v. United States,
792 F.2d 639, 645 (7th Cir. 1986) 7

Savic v. United States of America,
702 F.Supp. 695 (N.D.Ill.1988) 2

Savic v. United States of America,
918 F.2d 696 (7th Cir. 1990)
..... 1, 9,
10, 11,
14, 15,
19

Simmons v. Union Electric Company,
104 Ill.2d 444, 85 Ill.Dec. 347,
473 N.E.2d 946, 949 (1984) 9, 18

Smith v. Georgia Pacific, 86 Ill.App.3d
570, 408 N.E.2d 117 18

United States v. Aluminum Company of America,
148 F.2d 416, 433
(CA 2 1945) 16

Zenith Radio Corporation v. Hazeltine
Research, Inc. 395 U.S. 100, 123
89 S.Ct. 1562, 1576 L.Ed.2d 129
(1969) 14

STATUTES

Federal Rules of Civil Procedure
Rule 52(a), 28 U.S.C.A 12

Federal Tort Claims Act, 28 U.S.C.
Sections 2671-2680 ..... 2, 6

Illinois Revised Statute, Chapter 48
paragraphs 60-68 ..... 2, 6

28 U.S.C. Sec. 1254(1) 2

28 U.S.C. Sec. 1346(B) 6

29 C.F.R. Sec. 1926 450 (7)(1981)
..... 5

29 C.F.R. Sec. 1926 450 (9)(1981)
..... 5

29 C.F.R. Sec. 1926 450 (10)(1981)
..... 5

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

TOMISLAV SAVIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays for a writ of certiorari to issue to review a judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on November 19, 1990.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 918 F.2d 696 and is reprinted in the Appendix, p. 1c, infra.

The trial of this cause was bifurcated with the District Court for the Northern District of Illinois

(Duff, D.J.) ruling from the bench after the trial on liability. That portion of the official record is reprinted in Appendix, p. 1a, infra.

The memorandum decision of the District Court at the close of the case is reported at 702 F.Supp 695 (Northern District, Illinois 1988) and is reprinted in Appendix, p. 1b, infra.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 19, 1990. On December 5, 1990 Plaintiff timely petitioned the Seventh Circuit for Rehearing or for Rehearing En Banc. On January 14, 1991 the Seventh Circuit denied the petition for rehearing. Appendix, p. 1d, infra. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves the Illinois Structural Work Act, Illinois Revised Statute, Chapter 48 paragraphs 60-68 and the Federal Tort Claims Act 28 U.S.C. Sections 2671-2680. The Illinois Act is reprinted in the Appendix, p. 1e, infra.

STATEMENT OF THE CASE

Tomislav Savic had been employed as a roofing laborer for Kovilic Construction Company, Inc. (Kovilic) when he fell from a roof attempting to descend on a ladder and sustained severe injuries to

his arm, ribs, kidney and hip. Kovilic had contracted with the United States to strip and re-roof canopies covering loading docks on three warehouses at the Great Lakes Navel Training Station in Great Lakes, Illinois.

The United States Government construction contract that was used provided that the work would be performed under the general direction of the contracting officer, who would designate a representative of the government and under the direction of the contracting officer have complete charge of the work and exercise full supervision and general direction of the work so far as it affords the interest of the government. The contract further provided among other things that the government may at any time make any change in their work including but not limited to changes in the specifications, the method or manner of the performance of the work, equipment, services, or direct acceleration in the performance of the work. The contract further provided that the government may order the contractor to suspend or delay all or any part of the work for such time as he may determine to be appropriate for the convenience of the government[1]. The Department of the Navy maintained on the premises an officer whose title was "Resident Officer in Charge of Construction" who actually administered all of the construction contracts at Great Lakes, Illinois.

---

[1]See Appendix 1f

The government employed two construction inspectors, Skonie and Syska, whose responsibilities included general over sight responsibilities of Kovilic's performance; to act as safety inspectors to assure compliance with Army Corp of Engineers and OSHA Safety Standards; to instruct the individual worker, for Kovilic to cease doing anything that may endanger his safety and the welfare of those around him; to stop a project if they saw anything unsafe and generally conduct inspection for quality of work and for unsafe work practices. They had the authority to stop the work until corrective action was taken in either the quality of the work or safety practices. They had the ultimate authority to promote safety.[2] They each visited the worksite three to four times a day.[3] Their supervisor was Mr. Barnett, the project manager.

On the portion of the roof work where Savic was injured, Kovilic's workers climbed the roof with the use of an aluminum extension ladder. There was substantial evidence that the top of the ladder had been attempted to be secured by the use of nails along the side of the ladder, however, one of the government inspectors recalled the ladder being tied with a wire. Marko Letica, a co-worker of Savic, testified that nothing was used to secure the ladder

---

[2]See excerpts of testimony of Barnett, Skonie and Syska, Appendix 1h, 1i and 1l

[3]See excerpts of Kovilic's testimony, Appendix 1k

from time to time prior to the time of Savic's injury and that the government inspectors were present when this occurred.[4] There was uncontroverted evidence that the ladder was not secured at its base as required by OSHA[5], that the ladder exceeded a maximum 4 to 1 pitch required by OSHA[6], and there was uncontroverted evidence that the ladder was too short in that it did not protrude three feet above the working surface as required by OSHA[7].

Plaintiff's expert, Charles Schultz, former government safetv inspector, testified that all four of the aforementioned defects violated OSHA and safety practices of the construction industry and were the cause of Savic's fall. The ladder was climbed in this condition by the government inspectors during their daily inspections.

On the morning of August 10, 1981 Savic descended the ladder in a crouched position in order to grab the top of the ladder which extended only below his knees. Upon stepping on the ladder, it moved causing Savic to fall off the roof onto the ground some 18 feet below.

---

[4]See excerpts of Letica testimony, Appendix 1g

[5]29 CFR Section 1926 450 (10) 1981

[6]29 CFR Section 1926 450 (7) 1981

[7]29 CFR Section 1926 450 (9) 1981

This case arose under the Federal Tort Claims Act 28 U.S.C. Section 2671-2680 (FTCA). The law which is to be applied is the law of the State of Illinois, "the law of the place where act or omission occurred", 28 U.S.C. Section 1346(b). The trial court in applying Illinois law found that the United States was liable pursuant to the Illinois Structural Work Act, Illinois Revised Statutes Chapter 48, paragraphs 60-69.[8]

The government appealed the District Court's judgment to the Seventh Circuit Court of Appeals. In preparing the Record on Appeal the government did not include the exhibits that were introduced at trial. Accordingly the Appellate Court did not have before it any of the numerous photographs of physical evidence including the site and ladder in question, as well as others of varying lengths showing their relationship to the site of the work performed.

The Appellate Court, after reviewing only a partial record, found that based on its view of what weight should have been afforded to what it felt was credible testimony as opposed to what the District Court believed, that the District Court's judgment was clearly erroneous and was therefore reversed.

---

[8]For entire text see Appendix 1e

REASONS FOR GRANTING THE WRIT

I.

REVIEW IS NECESSARY TO PREVENT THE SEVENTH DISTRICT COURT FROM IGNORING ILLINOIS LAW AS IT RELATES TO THE ILLINOIS STRUCTURAL WORK ACT AND PREVENT THE APPLICATION OF THE ACT IN FEDERAL TORT CLAIMS CASES WHICH ARE IN DIRECT CONFLICT WITH THE DECISIONS OF THE ILLINOIS SUPREME COURT.

The Appellate Court's decision that the District Court was clearly erroneous in finding that the Government did not "have charge of" the work as required under the Illinois Structural Work Act ("Act") is in direct conflict with the decisions of the Illinois Supreme Court.

Whether one has charge of work under the Act is a question of fact, a finding which can be overturned on review only if it is clearly erroneous Phillips vs. United States, 792 F2d 639, 645 (7th Cir. 1986).

The Illinois Supreme Court in Larson vs. Commonwealth Edison Company, (1965), 33 Ill.2d 316, 321-22, 211 N.E.2d 247, 451, stated:

> "While it may be conceded that some of the decisions in this jurisdiction involving the Scaffold Act appear to have equated 'having

charge' with; supervision and control; in varying degrees, it is our opinion the language of the statute, and the legislative intent it reflects, do not permit the conclusion that the terms are the inflexible and unbending legal equivalent of the other. *The term 'having charge of' is a generic term of broad import, and although it may include supervision and control, it is not confined to it.* As was said of the word 'charge' in People vs. Gould, 345 Ill.288, 323, 178 N.E. 133, 148; 'The word does not necessarily include custody, control or restraint, and its meaning must be determined by the associations and circumstances surrounding its use. "To have charge of" does not necessarily imply more than to care for or to have the care of.'* * *. *[Consistent with its beneficent purpose of preventing injury to person employed in the extra-hazardous occupation of structural work, the thrust of the statute is not confined to those who perform, or supervise, or control, or who retain the right to supervise and control, the actual work from which the injury arises, but, to insure maximum protection, is made to extend to owners and others who have charge of the erection of alteration of any building or structure.]'* (Emphasis added.)

The Court went on to hold that the mere right to stop the work done in a dangerous manner makes those persons "having charge" within the meaning of the Act whether the right is exercised or not Larson at 252.

The Illinois Supreme Court in Miller vs. DeWitt, 37 Ill.2d 273, 266 N.E.2d 630, 639 (1967) reaffirmed its ruling in Larson supra.

The Illinois Supreme Court in Emberton vs. State Farm Mutual Automobile Insurance Company, 71 Ill.2d 111, 373 N.E.2d 1348 (1978) held that both the owner of the property as well as the architect "had charge" of the work being done by a contractor. The owner was held liable even though it did not exercise control over the manner in which the work was done or concerned itself with the assembly and construction of scaffolds. Liability was merely predicated on frequent job inspections and issuances of change orders. The architect was held liable because he had the authority to stop work whenever such stoppage may be necessary to insure the proper execution of the contract. Emberton at 669.

The Illinois Supreme Court in Simmons vs. Union Electric Company, 104 Ill.2d 444, 85 Ill.Dec. 347, 473 N.E.2d 946, upheld a finding of an owner to "have charge" where the work performed by the contractor was "subject to inspection and final acceptance" and the contractors only entered the premises upon the request of the owner.

The Appellate Court in reversing the District Court's factual finding of "having charge of" ignored and refused to follow the dictates of the Illinois Supreme Court. Instead it has held that 10 factors must be considered in determining whether a defendant "has charge of" work. 918 F.2d 69. The

Appellate Court then goes on to recite those factors which are cited in Chance vs. City of Collinsville, 112 Ill.App.3d 6, 445 N.E.2d 39, 42 (1983). Those factors constitute a summary of factors taken into account from time to time in various appellate decisions as probative on "having charge of" they are not exclusive. Johnson vs. Commonwealth Edison Company, 88 Ill.Dec. 449, 453 N.E.2d 1057 (1st Dist. 1985). The Appellate Court treated the 10 factors as if they constituted prima facie requirement for "having charge of" then simply arithmetically concluded that the factors "weigh" in favor of the Government 7 to 3 and therefore the District Court's finding was erroneous.

The Appellate Court went on to hold that because in its view the evidence did not demonstrate control of the day to day work, or continued and constant supervision that the District Court was clearly erroneous in finding the Government "having charge of". 918 F.2d 703.

This ruling is not a finding of clearly erroneous fact rather it is a statement of law, one that is in direct conflict with the decisions of the Illinois Supreme Court as set forth in Larson, Miller, and Emberton supra. The mere right, whether exercised or not, to stop the work if it is done in a dangerous manner or inconsistent with the contract can make a person "have charge of".

No where is it more evident that the Appellate Court is attempting to make new law in direct

conflict with the decisions of the Illinois Supreme Court then when it stated;

> "We decline to hold that the mere Government inspection of work being performed by an independent contractor to assure that the independent contractor is following the necessary safety precautions, is by itself, enough to shift the responsibility for taking safety precautions to the Government." 918 F.2d at 703.

Not only is this policy making on the part of the Appellate Court, but also demonstrates a failure to recognize that Illinois courts have determined that more than one entity can "have charge of" a project, even though the Court acknowledges this fact in its opinion. 918 F.2d at 700. Accordingly, there is no necessity for a "shifting of responsibility" in order for the Government to be "in charge of".

It should be noted that the Appellate Court relies on an earlier Seventh District opinion to buttress its conclusion. Cannon vs. United States, 328 Fed.2d 763 (7th Cir. 1964). However, that decision was rendered one year before the standards announced by the Illinois Supreme Court in Larson supra.

II.

THE COURT OF APPEALS MISAPPREHENDED AND MISAPPLIED THE CLEARLY ERRONEOUS STANDARD OF FEDERAL

RULES OF CIVIL PROCEDURE 52(a), 28 USCA.

The issues on which the Appellate Court reversed the District Court's judgment were specifically;

1. That the Government did not "have charge of" the job.

2. That three of the four defects of the ladder in question upon which evidence was presented were not proximate causes of the injury to Savic.

3. That the Government did not willfully violate the Illinois Structural Work Act.

All three of the findings by the District Court that were reversed were findings of fact. The standard governing Appellate review of the District Court's finding of fact is that set forth in Federal Rules of Civil Procedure 52(a):

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses."

A careful reading of the decision by the Appellate Court in this case demonstrates that it reversed the finding of the trier of facts simply because it was convinced that it would have decided the case differently. Accordingly, the Court of Appeals misapprehended and misapplied the erroneous

standard and must be reversed. Anderson vs. City of Bessemer City, N.C., 105 S.Ct.1504 470 U.S. 562, 84 L.Ed.2d 518.

If the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as a trier of fact it would have weighed the evidence differently. This is true even when the District Court's findings do not rest on credibility determinations, but are based on the physical or documentary evidence or inferences from other facts. Anderson supra 105 S.Ct. at 1507. In the instant case, the Appellate Court did not even have the entire record in front of it from the standpoint of photographic and physical evidence to determine what inferences the District Court drew from same. Furthermore, the Court of Appeals failed to give due regard to the District Court's ability to interpret and discern the credibility of oral testimony. Indeed the Appellate Court chastised the District Court for determining the credibility, analyzing facts and drawing inferences from the facts based on the Trial Court's own experiences in life rather then having viewed the evidence as the Appellate Court would have. This criticism is curious in light of the fact that under Illinois law jurors are instructed that in considering the evidence in a case they are not required to set aside their own observations and experiences in the affairs of life but they have a right to consider all the evidence in the light of their

own observations and experiences in the affairs of life.[9] Clearly the District Court cannot be required to do otherwise.

The Appellate Court failed to follow the principal that their function is not to decide factual issues de novo. Zenith Radio Corporation vs. Hazeltine Research, Inc., 395 U.S. 100, 123 89 S.Ct. 1562, 1576 23L.Ed.2d 129 (1969). The Appellate Court's decision is replete with examples of de novo fact finding. Not only does the Appellate Court criticize the District Court's reliance on his experience in life in deciding the credibility, weight and application of the facts in arriving at his judgment; but it berates the Court for giving credence to Plaintiff's expert testimony because his opinion was based on a disputed ladder, 918 F.2d at 705 Foot Note 11. The District Court is attacked for its credibility finding as to whether the ladder that Kovilic testified that he gave to his insurance company a few months after the accident was in fact the ladder involved in the fall. Kovilic firmly believed it was the ladder at the time he gave the ladder to his insurance company, and did not believe the ladder might not be the ladder in question until after the Plaintiff's expert in-

---

[9]Ill.Rev.Stats. 1987 ch. 110a, sec. 239 (a); Ill.Patern Jury Instr. - Civil (IPI) 3d Ed. ch. 1-60 (1990)

spected and measured same while Kovilic was still a third party Defendant.[10] The Court as a trier of fact was in a position to determine the credibility of Kovilic, his bias and interest, and had the opportunity to view photographs of the ladder and its relationship to the work site and to draw inferences therefrom in conjunction with other testimony presented at trial. The Appellate Court did not have such opportunity.

The Appellate Court also made a de novo finding of fact relative to Letica's testimony that the ladder had not always been previously attached when persons were climbing on it, and independently found that Letica's testimony was questionable for what the Appellate Court deemed was impeachment or bias; and therefore the District Court had no business relying on this testimony to determine that the Government knew of the dangerous condition and simply decided to do nothing about it. Such a conclusion by the Appellate Court fails to give due deference to the Trial Court. The Appellate Court went on to say in its view the "overwhelming weight of credible evidence" shows that the Government had no knowledge that the nail had previously been detached when the ladder was in use, 918 F.2d 706. This statement by the Appellate Court clearly demonstrates that it is engaging in de novo fact finding.

---

[10]See excerpts of Kovilic's testimony, Appendix 1k

The Appellate Court disagreed with the District Court as to the finding that three defects existed and held that in any event, in its view, those defects were irrelevant and the District Court was clearly erroneous in finding that three of the four defects were the proximate cause of Savic's injuries. The question of proximate cause under the Act is a question of law only when facts are not disputed and where there can be no difference in the judgment of reasonable men. Kochan vs. Commonwealth Edison Company, 123 Ill.App.3d 844, 848, 79 Ill.Dec. 367, 463 N.E.2d 921. However the Appellate Court went on to substitute its own judgment of what evidence should be believed. It held that in its judgment Plaintiff's expert Schultz' opinion as to causation was discounted on cross-examination because in its view Schultz said that if the nails had been in place the ladder would not have fallen. Such testimony by Schultz was not internally inconsistent in that Savic's fall and not the fall of the ladder was in issue., Furthermore the District Court was in a position to determine the adequate basis, foundation and weight to be given to any cross-examination on the basis of all of the evidence before it as well as the photographs of the physical evidence. Thus Schultz' testimony that all four defects were the cause of Savic's fall rather then the ladder's falling was not contradicted by extrinsic evidence and not internally inconsistent. Accordingly there can be no clear error. Cf. United States vs. Aluminum Company of America, 148 F.2d 416, 433 (CA 2 1945), Orvis vs. Higgins, 180 F.2d 537 (CA 2 1950).

There was more than sufficient evidence for the District Court to conclude that the pitch of the ladder in excess of a 4 to 1 ratio caused the plaintiff to step out far over the edge of the canopy thereby contributing to his loss of balance when the ladder shifted. Furthermore, there was sufficient evidence to support the finding that the inadequate length of the ladder caused the Plaintiff to crouch in order to attempt to grab the ladder which was extending only 12 to 15 inches over the roof, thereby causing him to have his weight and center of gravity in a precarious position, contributing to his fall when the ladder shifted. Taking into account these factors coupled with the general instability of the ladder because of lack of proper fastening, the Appellate Court could hardly conclude that the District Court's finding that all four factors were contributing causes to Savic's fall was clearly erroneous.

The Appellate Court's conclusion that there was only one proximate cause, that of the lack of nails near the top of the ladder, and that the Government could not have been responsible therefore because such a condition never existed before it happened on the day of Savic's fall, is not only improper de novo fact finding for the reasons set forth above, but would necessitate a credibility finding that Letica was lying when he said the condition existed from time to time before the fall with the Government inspectors present. This credibility finding was not made by the District Court and cannot now be made by the Appellate Court.

The Appellate Court was also critical of the District Court's finding that there was no reliable evidence that Savic descended the ladder improperly. The Appellate Court was critical of the District Court because in its view there was no evidence to support such a finding since the only direct testimony on the subject was Savic's who said he did not descend the ladder improperly.[11] However, the fact that the Appellate Court even raises this issue is puzzling since comparative negligence is not applied to actions under the Act. The only inquiry is in assessment of the Defendant's culpability and not the Plaintiff's conduct. Hollis vs. R. Latora Construction, Inc., (1985) 108 Ill.2d 401, 410, 92 Ill.Dec. 494, 485 N.E.2d 4; Simmons vs. Union Electric Company, (1984) 104 Ill.2d 444, 459-60, 85 Ill.Dec. 347, 473 N.E.2d 946. Furthermore even if Savic's negligence was the primary cause of his fall, a concurrent violation of OSHA that contributed to the fall remains a question of fact for the fact finder. See Smith vs. Georgia Pacific, 86 Ill.App.3d 570, 408 N.E.2d 117. However the District Court in this case found that there was no negligence, primary or otherwise, with respect to Mr. Savic's conduct. For the Appellate Court to suggest otherwise it would not only have to engage in de novo fact finding, but in fact engage in sheer speculation.

To fully comprehend the extent to which the Appellate Court engaged in de novo fact finding, the entire record would have to be reviewed. Not only did it redetermine weight and credibility, but it

---

[11]See Appendix 1j

ignored or misapprehended evidence; e.g. the Appellate Court in its opinion relative to the "having charge of" issue stated that the Government only inspected the job twice a day, 918 F.2d 701, when the record shows as many as six to eight inspections per day.[12]

The Appellate Court in its decision has cited in part this Court's standard of review as set forth in Anderson supra, however, it has wholly failed to follow its dictates and sorely misapplied and misapprehended its meaning.

CONCLUSION

This is the only Court to which the decision of the Seventh Circuit can be appealled. Accordingly, for all the foregoing reasons it is submitted that the Petitioner for a Writ of Certiorari should be granted.

---

[12]See Appendix 1k

Respectfully Submitted,

RAY & GLICK, LTD.

Bogdan Martinovich

Bogdan Martinovich
RAY & GLICK, LTD.
P.O. Box 400
Libertyville, Illinois 60048-0400
(708) 680-9600

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

TOMISLAV SAVIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

Bogdan Martinovich
Of Counsel
RAY & GLICK, LTD.
611 South Milwaukee Avenue
Libertyville, Illinois 60048
(708)680-9600
Attorneys for Petitioners

APPENDIX
TABLE OF CONTENTS

Page

Appendix A: District Court's Ruling from Bench at close of liability portion of trial 1a

Appendix B: Memorandum Opinion and Order of the District Court December 29, 1988..... 1b

Appendix C: Opinion of the Court of Appeals November 19, 1990 ..... 1c

Appendix D: Order of Court of Appeals, denying Petition for Rehearing en banc January 14, 1991..... 1d

Appendix E: Relevant Statutory Provisions 1e

I. Illinois Revised Statutes, Chapter 48 paragraphs 60-68..... 1e

II. 29 CFR Sec. 1926 450 (7) (1981)..... 2e

29 CFR Sec. 1926 450 (9) (1981)..... 2e

29 CFR Sec. 1926
450 (10) (1981) 2e

Appendix F: Construction Contract 1f

Appendix G: Excerpts of Letica's Testimony 1g

Appendix H: Excerpts of Syska's Testimony 1h

Appendix I: Excerpts of Sconie's Testimony 1i

Appendix J: Excerpts of Savic's Testimony 1j

Appendix K: Excerpts of Kovilic's Testimony 1k

Appendix L: Excerpts of Barnett's Testimony ..... lj

APPENDIX A

District Court's Ruling from Bench at Close of Liability Portion of Trial

DISTRICT COURT'S RULING FROM BENCH AT CLOSE OF LIABILITY PORTION OF TRIAL
Pages 432 through 443

THE COURT: Okay. Well, first of all, let me tell you that -- and I'm quite sincere -- that sometimes my job gets very difficult and sometimes it's irksome, nettlesome, or boring, and with you three lawyers -- four lawyers it has not been any of the above. In fact, I am quite sincere, it's been a pleasure to have you in my courtroom. You worked hard, you have maintained your sense of humor, you have worked intelligently and responsibly, and I am more than happy to have had you with us this week.

I say that first because the loser doesn't even know afterwards what I'm saying, so I have to say it first. But it's not hard for me to rule on this case.

Having listened to all the evidence, having observed the witnesses and determined my sense of their credibility, applying my own knowledge of the law, my experiences in life, as I would instruct any jury, my sense of the facts, my consideration of the totality of the evidence, it is my opinion that on Count 1 the Government loses and on Count 2 the plaintiff loses, that is to say, on the Structural Work Act the plaintiff wins and on the negligence the Government wins. There is two counts, right? Yes.

Now, more specifically, for citations, some of the ones that you have actually given to me you can refer to. You have already mentioned Phillips. You

could add Emberton v. State Farm, which has been referred to earlier, Gannon v Chicago Milwaukee has been referred to earlier. That would relate to the Structural Work Act essentially.

Now, I would say that the Untied States for the purposes of the Act had charge of the project, not alone, but in the context of the Act had charge, because it had some direct connection with the work above mere ownership or employment of an independent contractor, which is what Phillips would refer to along with the Illinois cases it cited.

The United States inspected the work, they oversaw the work, in the opinion of the Court, they had a right to control the work. Whether or not that right was exercised constantly or in the fullest sense of the word, I believe they did.

In particular, there were two Government inspectors, each with slightly different roles, who investigated as much as seven times a day on location, they could have stopped the work for compliance with the safety regulations. The contract reflects their responsibility in that respect.

It is more than just their property, but it was their property. They were in total control of the circumstances of the base. They had a safety officer in control of the whole base and the construction came within the purview of the people who owned and ran the base, as did every project under it and specifically and directly this one.

I think that the social relationship may have had something to do with the situation. I think the Government was lazy or slack in their application of their control over the safety aspects of the Act.

Now, the Structural Work Act, as you will know, is a strict liability and it's to be applied for the purposes for which it was intended to the extent that it can be. I don't think that the Government relinquished any immunities in this respect. If at some future point in time the Government would like to give me some kind of a brief on some specific aspect I haven't dealt with adequately in their opinion in terms of sovereignty, I'll listen to that, but I don't see any here right now which would fit this set of facts.

I also believe that the dangerous condition was one which the United States knew of the existence of which. It was a -- or by the exercise of reasonable care could have discovered the existence of that condition, and I would refer you to Kohutko v. Four Columsn, Ltd., 148 Ill.App.3d, 181 at 187, a 1986 case, and Mathiew v. Venture Stores, Inc., 144 Ill.App.3d 783 at 795, also a 1986 case, and I think the government in particular -- to be more particular, but not to in any way denigrate from what I have already said, I would find as facts that the project was ongoing with the ladders being moved not only daily, but many times within each day for the purposes of allowing the workers to move along the platform of the ceiling or of the roof in terms of applying the asphalt.

They had to move the ladder, they had to move the buckets, they had to move the workers, and many workers were going up and down the ladder all day, and as far as I can see, the only consistent attempt -- well, it wasn't consistent, the general attempt to secure the ladder in my opinion was to use sixteenpenny nails.

There is no indication anywhere in the record that there were ever more than two used per side on either end of the ladder. There is some indication that there was one used, there is some indication that they were used fairly often, there is no indication that they were used constantly.

The inspectors actually went up the ladders and down. They knew the circumstances of the ladder. The ladder was, according to at least one witness, and I believe it, propped up against the outside track. Some say it was sometimes in the middle. I think that's possible.

There is no indication that these 2 x 4s or 4 x 6s were used constantly or regularly, since it's also apparent that sometimes one was used and sometimes the other and it's not certain that they were ever all used, and if they were, they were nailed to the ties so that the lower end of the ladder could rest against them.

There is no indication that they were always used or always moved when the ladder was moved. I don't believe they were from the general tenor of

what I have heard from all the witnesses in terms of the circumstances of the working place.

I believe that the ladder was lower than it should have been in its projection above the roof and I believe that the plaintiff put his left foot over onto the ladder, and before he had an opportunity to take a hold of the ladder with his right hand, the ladder moved and he fell.

Now, that suggests to me and I will find, that he did not try to go down the ladder forward. He is a laborer, a man of, it would appear to me, some intelligence some experience. He is a physically competent human being from what I observed of him physically and his expressions of himself and the experience to which he has referred, and I do not believe that he would try to go down a ladder backwards, but more than that, I think the testimony doesn't prove it in any way, shape, or form except some self-serving comments made by an insurance claims investigator who spoke to unnamed persons at the scene of the accident who didn't speak his language, were excited and upset, and if seeing him fall forward, which indeed he easily could have been, and I would tell you frankly that were I in his circumstances I would have made an effort to fall in the same fashion and I would have been successful.

I do not think that any human being with any reasonable agility would find it difficult to, if starting to fall backwards from a ladder 18 feet in the air or a roof 18 feet in the air, would have any difficulty turning enough to fall forward on his hands. In

fact, I think it would be even a rational attempt. There is really no direct evidence anywhere that he came down the ladder the wrong way.

I also find that the word "secured" is not met, and my ruling, finding of fact is that the ladder was not adequately secured by one or two sixteenpenny nails driven into a board one and a half or two inches deep with a projection of only an inch and a half above on a ladder which is clearly three times that length in its own elevation, also heavy, heavy enough to go 22 to 24 feet in the air -- excuse me, 20 to 24 feet in the air depending upon utilization, heavy enough to bear the weight of a 230 pound man. With that weight plus that ladder those nails could hardly be considered to be sufficient to secure the ladder from any extraordinary stress, leverage or pressure, and if the ladder weren't high enough and if the angle were too wide, then the extra stress, leverage or pressure might easily fall against those nails, which would be inadequate to serve the purpose.

I don't think that those nails were put in regularly and, I think the inspectors had an obligation to know they were not put in regularly and did know or should have known because of the frequency of their visits over the number of days. The custom and usage didn't stop during those days or change in any fashion.

The question of "in charge of," I think that the Government had a sufficient degree of supervision and control. They had retained the right to super-

vise and control. They could have stopped the work at any time. They weren't constantly on location, but they were on location several times a day every day for a number of days.

The contract suggested they had a right, they did have in my opinion a meeting that could be considered to be adequate to include the concept of safety, there was safety discussed, according to the Government and its own witnesses. They had responsibility for monitoring the compliance with the contract. The contract included safety requirements. They could have changed the work circumstance. As the man said, you know, he could have told them to, and when I asked him, "Could you stop them from using that asphalt bucket? Certainly could."

Well, if you can stop them from using an asphalt bucket, you can certainly stop them from inadequately supporting a ladder.

Now, the authority to issue change orders isn't important in this situation. The right to stop work, they did, they said they did, I would find they did under any circumstances.

The ownership of equipment is not relevant to this instance. They were surely and clearly familiar with construction customs and practices of this job and of every other job since they spoke of the large number of times that they were involved in letting construction contracts on the base, and I think the difference between the word "assure" and "insure" is important.

They didn't have to insure workers' safety because they weren't an insurance company, but they did indeed have the ability to assure workers' safety by simply speaking to the issue to the contractor in many, many ways, not only under the contract itself, but under the fact that they gave out the contract and could give out more contracts and had given out contracts in the past, as well as to assure simply by pointing out the lack of compliance and the necessity of complying.

But in addition to that, the other rights and powers that they had, which were more than merely property owners, gave them the ability to assure workers' safety and very conveniently, by the way, without any great stress.

I think they were lax and lazy, and I think that under the circumstances it all constitutes a willful -- under the statute -- as we know, "willful" under the statute doesn't require the same kind of willfulness that an intentional tort under the common law would require.

I think the plaintiff's expert witness lacked something, to be sure. Too bad you can't pay him afterwards instead of before. But by the same token, he did include in his testimony some of the things that he was called upon to do, references to the statutes and references to the rules, and I did pay attention to his testimony, I didn't give it any greater credibility than it deserved, but I will tell you as you

inquired in fact, yes, I have had a great deal of experience on ladders, as a matter of fact.

I have been a laborer in my life on more than one occasion, and as I say, even a homeowner gets a certain amount of experience with ladders. But I used ladders in the navy, I used ladders when I was a worker on the highways in the Commonwealth of Massachusetts many years ago, I washed trucks and moved things around for Rouan Motor Transport out in Iowa years ago, and I painted fences with creosote and buildings with creosote on ladders when I was a healthy young lad.

I know without any difficulty at all the actions that his laborer was going through when he was attempting to get off that roof and on to that ladder.

I am sure, and I find, that the ladder was not high enough above the leverage of the building, and it was insecure, that it was -- now, as far as the negligence is concerned, I don't think that under the common law rules of negligence I can find the Government negligent. I think there is a clear distinction, and so I rule against the plaintiff on negligence. That means the issue of contributory negligence is not an element that I need to deal with.

Now, I think I have covered everything. It took me more than five minutes.

Now, we need to deal with the issue, since this is a bifurcated trial, of damages. I would suggest that

what I would first ask you to do is talk to each other about that. If you need to have it resolved by me on a trial, we can set a date and time for that. You can do it by stipulation if you wish.

You can have the plaintiff come back and talk about his pain and suffering if you want. You can have me take the testimony that I have already heard if you want. You can settle it if you want. You can tell how long you think it will take me to try it.

And if you want, I think -- I'm not sure of this, but I maybe we could refer it to a magistrate if you wanted too, but I'm not sure. The liability having been found, I think the damages could be done that way.

So I'm happy to do whatever you four discuss with each other and decide.

MR. MARTINOVICH: Can we have a short status date? That will give us an opportunity to get together.

THE COURT: Yes. Let's have Mrs. Brotherson call and pick a date. It will be early next week.

MR. MARTINOVICH: You will be on vacation, though.

THE COURT: My staff is not going to be around. I'm not going on vacation as soon as they are, but that means I won't be on the bench, and

that won't -- but I won't lose all of my support systems until the 18th. So we can do it early next week.

MR. MARTINOVICH: Thank you, Judge.

MR. FLESSNER: Thank you.

MS. GINSBERG: Thank you.

APPENDIX B

Memorandum Opinion and Order of the
District Court
December 19, 1988

(Filed December 29, 1988)
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT ILLINOIS
EASTERN DIVISION
702 F.Supp. 695 (N.D.Ill. 1988)

Tomislav Savic and Kristina
Savic, Plaintiffs,

vs.

Civ. No. 83 C 5388

The United States of America
and S.W. Barnett, Defendants.

The United States of America,
Third Party Plaintiff,

vs.

Kovilic Construction Co., Inc.,
Third Party Defendant

MEMORANDUM OPINION AND ORDER

BRIAN BARNETT DUFF, District Judge

Plaintiff Tomislav Savic has sued the United States of America under the Federal Claims Act ("the FTCA"), 28 U.S.C. Sec. 2671 et seq. for violations of the Illinois Structural Work Act, Ill.Rev.Stat. ch. 48, sec. 69, resulting in his fall from the roof of a building at the Great Lakes Naval Base while work-

ing for Kovilic Construction Co., Inc. The case came before the court as a bifurcated trial beginning in August, 1988. On August 7, this court ruled, for the reasons stated in open court, that the United States was liable to the plaintiff his injuries because it was in charge of the construction project for the purposes of the Structural Work Act, 689 F.Supp. 854. This court now makes the following findings of fact and conclusions law with regard to the damages phase of the trial.

FINDINGS OF FACT

1. Plaintiff was born on March 27, 1954 in Yugoslavia, and attained an eighth grade education in that country.

2. Plaintiff worked primarily as a farmer in Yugoslavia but also did work as a roofer on an informal basis there.

3. Plaintiff came to the United States in 1980 and, through mid-1981, worked as a greenskeeper at the Owentsia Country Club in Lake Forest, Illinois.

4. Plaintiff is married and presently has two children, aged 2 and 11.

5. Plaintiff's wife works as a janitor at Lake Forest College in Illinois.

6. In late July, 1981, plaintiff was employed as a laborer by Kovilic Construction Co. ("Kovilic").

7. Plaintiff worked as a roofer for Kovilic at a roofing job at the Great Lakes Naval Base in Great Lakes, Illinois for the two weeks prior to August 10, 1981.

8. At the time, plaintiff was earning $11.87 per hour; experienced roofers were earning $16.50.

9. On August 10, plaintiff fell off the roof of a building on which he was doing work for Kovilic, injuring his left elbow, his left kidney, and his left leg.

10. The United States was in charge of the project.

11. The injury to his elbow required three separate hospitalizations for surgery.

12. Plaintiff's medical expenses incurred as a result of the injuries caused by the fall came to $18,523.35.

13. Plaintiff will eventually need surgery on his elbow to relieve the pain caused by further deterioration, costing approximately $10,000.

14. Plaintiff speaks English at a third grade level and, despite his efforts to learn the language, cannot and will never master it sufficiently to gain employment requiring fluency in the language.

15. Plaintiff's mathematical skills are at a sixth grade level and, due to his below-average intelli-

gence, will not improve much beyond this level irrespective his efforts.

16. The injury to his elbow has prevented and will continue to prevent plaintiff regularly lifting more than 20 pounds (although under some circumstances he may occasionally do so) and, together with his inability to speak English, has prevented and will prevent him from doing anything but menial labor at a wage of approximately $5.50 per hour at present wage levels.

17. Plaintiff is a responsible individual devoted to supporting his family, has done whatever he reasonably could to mitigate his damages from the fall, including taking on available work that he was capable of doing in the years following his injury (with the exception of one period during which he remained home with his newborn child when babysitters' fees approximated his wages but not his wife's.).

18. As a result of his injuries, plaintiff lost the following amount of wages from the date of his injuries through the date of trial (based on a wage of $11.87 per hour at 40 hours per week for 50 weeks a year and subtracting out the amounts he either earned or would have earned had he taken an available job he could handle):

a. 1981 - $ 9,400
b. 1982 - $ 19,200
c. 1983 - $ 23,700
d. 1984 - $ 20,700

e. 1985 - $ 20,700
f. 1986 - $ 20,700
g. 1987 - $ 13,700
h. 1988 - $ 13,700
Total $141,800

19. Had plaintiff not sustained the injuries he did in 1981, he would today be working as a roofer at a rate of approximately $16.50 per hour.

20. Because of his injures, plaintiff will only be able to earn $5.50 per hour in the future.

21. From now through the time he reaches 65 years of age, at which point he would have stopped working as a roofer, plaintiff will lose $11.00 per hour for 40 hours a week for 50 weeks a year, or $22,000 a year, for 31 years, as a result of his injuries.

22. Based on the seasonal and risky nature of work as a roofer, there is a 60% probability that plaintiff would have remained employed as a roofer full-time through the age of 65 had he not been injured.

23. The fall caused plaintiff to experience pain and suffering from his left arm, kidney and leg, but plaintiff failed to establish that the fall caused the lower back pain he now suffers.

24. Plaintiff's past pain and suffering quantifiable in an amount of $45,000.

25. Plaintiff will experience pain and suffering in the amount of $5,000 in the future provided that he has the $10,000 operation to relieve the pain caused by further deterioration of his left elbow.

26. In the absence of such an operation, plaintiff would experience an additional $10,000 in future pain and suffering.

27. Plaintiff recovered $100,000 in a settlement with Kovilic for injuries resulting from the fall.

CONCLUSIONS OF LAW

1. This court has jurisdiction pursuant the FTCA, 28 U.S.C. sec. 1346(b). Venue is not contested.

2. Illinois substantive law governs this case.

3. Plaintiff's injuries to his left arm, kidney and left leg, were proximately caused by the August 10, 1981 fall.

[1] 4. The United States is liable under the Structural Work Act, Ill.Rev.Stat. ch. 48, sec. 69, for these injuries and resultant damages.

[2-5] 5. Plaintiff is entitled to recover for (a) his past medical expenses, (b)future medical expenses, (c) his lost past wages, (d) his lost future wages, (e) his past pain and suffering, and (f) his future pain and suffering.

(a) Plaintiff has sustained $18,500 in past medical expenses.

(b) Plaintiff will sustain an additional $10,000 (present dollars) in future medical expenses.

(c) Plaintiff lost a total of $141,800 in past wages.

(d)(1) Plaintiff's damages for loss of future earnings must be calculated at their present-day cash value. Fenolio v. Smith, 802 F.2d 256, 258 (7th Cir.1986). At $22,000 a year for the next 31 years, plaintiff's lost earnings have a present-day cash value (at a discount rate of 2%, see O'Shea vs. Riverway Towing Co., 677 F.2d 1194, 1199 (7th Cir.1982) of $504,630.

(d)(2) This amount must be reduced by 40%, to $302,778 to account for the seasonal and risky nature of plaintiff's work. See O'Shea v. Riverway Towing Co., 677 F.2d at 1200.

(d)(3) The United States argues that this amount must be further reduced to account for the income taxes plaintiff would have had to pay had he received the money as income over the next 31 years, since the damages award will not be taxed. Although Harden v. United States, 688 F.2d 1025 (5th Cir.1982), involved a wrongful death claim, the United States cites it for the proposition that Norfolk & Western R. Co. v. Liepelt, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), mandates a deduction for income taxes under the FTCA even where, as here, state law does not allow for a deduction of

income taxes from personal injury awards, see McCann v. Lisle-Woodridge Fire Protection District, 115 Ill.App.3d 702, 705-08, 71 Ill.Dec. 432, 450 N.E.2d 1311 (1983); see also Klawonn v. Mitchell, 105 Ill.2d 450, 454-58, 86 Ill.Dec. 478, 475 N.E.2d 857 (1985) (rejecting Liepelt for state law causes of action). Compare Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486-87, 101 S.Ct. 2870, 2879-80, 69 L.Ed.2d 784 (1981) (Liepelt established a federal common law rule for all federal causes of action).

Although the rule set forth in Harden might require the deduction of federal income taxes here, but see In re Air Crash Disaster Near Chicago, Ill., 701 F.2d 1189, 1195-96 (7th Cir.1985) (distinguishing wrongful death from personal injury claims), this court disagrees with the Fifth Circuit that Liepelt mandates the deduction of income taxes in all actions under the FTCA. "Damages under the Federal Tort Claims Act are assessed according to state law." Jastremski v. United States, 737 F.2d 666, 672 (7th Cir.1984). Harden held that an income tax deduction was required by the FTCA's prohibition against punitive damages, 688 F.2d 1029; see 28 U.S.C. sec. 2674; Felder v. United States 543 F.2d 657, 665-66 (9th Cir.1976), but that holding is inconsistent with the Illinois nondeductibility rule.

Under Illinois law, as in many states, federal tax liability is excluded from consideration of compensatory damage awards not to punish the government but instead to ensure full compensation for the victim. McCann v. Lisle-Woodridge Fir Protection

District, 115 Ill.App.3d at 706-07, 71 Ill.Dec. 432, 450 N.E.2d 1311. As the Eighth Circuit held in Manko vs. United States, 830 F.2d 831 (8th Cir.1987):

> Whether to deduct income taxes is simply one of many issues courts face in deciding what is fair compensation for the injury. Other such issues are whether to apply the collateral-source rule, whether or award pre-judgment interest, how certain a forecast of future earnings must be, how to value pain and suffering, and so forth. Different jurisdictions resolve these issues in different ways, but they have nothing to do with "punitive damages" as that term is traditionally used in the law. They do not depend on a finding of wanton or malicious conduct, they are not imposed to punish a defendant, and they have nothing to do with a defendant's net worth-all questions that customarily arise when punitive damages are awarded. We conclude that Congress did not mean to outlaw all variations from some ideal norm of compensation when it forbade "punitive damages." It was referring only to the concept in its traditional sense.

Id. at 836. Accordingly, this court rules that the United States is not entitled to a deduction in plaintiff's ward for income taxes. Moreover, even were this court to rule otherwise, the United States has presented no evidence as to the amount plaintiff's award would have to be reduced and, in the absence of such evidence, this court would not attempt a purely speculative calculation as to the proper amount to deduct.

(e) Plaintiff is entitled to recover $45,000 for past pain and suffering.

(f) Plaintiff is entitled to $5,000 for future pain and suffering. (Had this court agreed with the government that plaintiff did not prove that he will need $10,000 in future medical expenses to relieve the pain from the deterioration of his left elbow, the court would have awarded him an additional $10,000 for future pain and suffering).

6. Plaintiff's total damages come to $523,078.

7. The United States is entitled to a credit of $100,000 by reason of plaintiff's settlement with Kovilic, Ill.Rev.Stat. ch. 70, sec. 302(c); O'Connor v. Pinto Trucking Service, Inc., 149 Ill.App.3d 911, 103 Ill.Dec. 242, 501 N.E.2d 263 (1986), bringing the liability of the United States to $423,078.

[6] 8. The United States argues that this amount should be further reduced to reflect only its relative culpability in the incident. Although it recognizes that under Illinois law, indeed under well-settled principles of common law throughout this country, apportionment among joint tortfeasors of their liability to the injured does not exist, the United States grounds its argument on the FTCA. According to the United States, because the FTCA only permits recovery against the government for its negligent or wrongful acts, Loque v. United States, 412 U.S. 521, 93 S.Ct. 2215, 37 L.Ed.2d 121 (1973), it is entitled to

a credit for Kovilic's share of culpability in the incident as a matter of federal law.

This argument is essentially one for a federal common law rule of apportionment among tortfeasors. Recognizing that such a rule is unsupported by any FTCA caselaw, the United States attempts to distinguish this case from the ordinary joint tortfeasor situation based on the Structural Work Act's imposition of liability on persons "having charge of" work, a theory of liability distinct from ordinary common law negligence. Yet, for purposes of the FTCA, this is a distinction without a difference.

The Seventh Circuit has held that under statutes imposing liability against an owner "in charge of" work, the United States can be held liable under the FTCA, since such statutes are predicated on the owner's wrongful conduct. Fentress v. United States, 431 F.2d 824 (7th Cir.1970); also see Phillips v. United States, 792 F.2d 639 (7th Cir.1986). And under the Structural Work Act, liability is joint and several. Dinschel v. United States Gypsum Co., 83 Ill.App.2d 466, 476-77, 228 N.E.2d 106 (1976). Thus, a Structural Work Act case against the government is no different than any joint tortfeasor situation, and in the absence of a contrary federal statute, the United States is entitled to apportionment only to the extent that applicable state law allows it. See Estate of Warner by Warner v. United States, 669 F.Supp. 234, 236 (N.D.Ill.1987). Illinois law does not. See Ill.Rev.Stat. ch. 70, sec. 302(c)

CONCLUSION

Judgment is entered for the plaintiff and against the United States in the amount of $423,078.

APPENDIX C

Opinion of the Court of Appeals
November 19, 1990

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-1399

TOMISLAV SAVIC,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant and Third Party Plaintiff-Appellant,

v.

KOVILIC CONSTRUCTION COMPANY, INCORPORATED,

Third Party Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 5388—**Brian Barnett Duff,** *Judge.*

ARGUED FEBRUARY 13, 1990—DECIDED NOVEMBER 19, 1990

Before WOOD, JR., COFFEY, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* The United States appeals the district court's finding of liability and the award of damages following a bench trial pursuant to the Illinois Structural Work Act, Ill. Rev. Stat. ch. 48, Pars. 60-68, and the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 in favor of Tomislav Savic. We reverse.

Cited as Savic vs. United States of America,
918 F. 2d 696 (7th Cir. 1990)

I.

FACTS

Tomislav Savic had been employed as a roofing laborer for Kovilic Construction Co., Inc. ("Kovilic") for approximately two weeks prior to his fall from a ladder, in which he sustained injuries to his arm, ribs, kidney and hip. Kovilic had contracted with the United States to strip and re-roof the canopies covering loading docks on three warehouses at the Great Lakes Naval Training Station in Great Lakes, Illinois.

The standard United States Government construction contract was used on this project and placed the responsibility for proper safety and health precautions on the contractor. Kovilic, the contractor, was required to submit a safety plan for the project, and the parties stipulated that a pre-construction conference was held at which the government, among other things, discussed Kovilic's responsibility for the safety of his employees and the administration of the contract, as well as the applicable labor standards.

The government retained the authority under the contract for general oversight of the project, such as the ability to stop work for any safety violations observed and the authority to change the construction specifications during the performance of the work. In the Accident Prevention section of the contract, the "Contractor" (Kovilic) was required to take actions necessary to ensure a safe workplace, but the Government only had the responsibility to "notify the Contractor of any noncompliance with the foregoing provisions and the action to be taken. The Contractor shall, after receipt of such notice, immediately take corrective action." At a later point in that section, the contract provided: "If the Contractor fails or refuses to comply promptly, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken."

The government employed two experienced construction inspectors whose responsibilities included general oversee-

ing responsibilities of Kovilic's performance and ensuring quality control during the term of the contract. One of the inspectors, Mr. James Skonie, was a government employee, and the other, Mr. Joseph Szyszka, was an employee of an independent contractor.

On the particular portion of the roofing job where Savic was injured, Kovilic's workers climbed to the roof via an aluminum extension ladder. Even though there was a conflict in testimony between the government's construction representative and other witnesses dealing with the method of how the ladder was secured, the judge failed to state why he chose to believe that the ladder was attached by nails, rather than wire in spite of the fact that James Skonie, one of the government's construction representatives, testified that he recalled the ladder being tied and secured at the top with wire. There was also conflicting testimony at trial on the question of whether attaching the top of the ladder with nails was the safest method, but the two construction representatives and the plaintiff's ladder expert did agree that this method would have prevented the ladder from moving sideways and thus would have prevented the accident. At trial Savic testified that at the beginning of the work day on the morning of August 10, 1981 he climbed the ladder, and that the ladder was attached to the roof, as it had been in the past, and further, that he and one of his co-workers moved a tar pipe[1] immediately prior to his accident. Moving the tar pipe necessitated the detachment of the ladder from the roof momentarily in order that the pipe might be passed behind it. Although it is unclear from the evidence whether Savic or his co-worker detached the ladder, it is clear that it was not reattached to the roof after the pipe had been moved. Immediately after moving the pipe, Savic was summoned by his supervisor (Nic Kovilic) to help him move some insulation on the ground. As Savic stepped

[1] The tar pipe is a pipe which is used in pumping hot tar from ground level to the roof.

on the ladder to descend, the ladder moved sideways, catapulting Savic to the ground, some eighteen feet.[2]

As a result of the fall, Savic injured his left elbow, fractured four ribs, damaged his left kidney as well as his left hip. After being awarded worker's compensation for his claim against Kovilic, Savic filed suit against the United States claiming violations of the Illinois Structural Work Act and common law negligence. The United States filed a third-party complaint against Kovilic Construction, on the grounds of common law indemnity, and later amended the third party complaint to include a claim under the Contribution Among Joint Tortfeasors Act, Ill. Rev. Stat. ch. 70, pars. 301-305. Over four years after the filing of the original third-party complaint, the trial judge refused to allow a further amendment by the United States, a claim against Kovilic for contractual indemnity, because of the lapse in time. Kovilic was dismissed from the action prior to trial after settling directly with Savic. *Savic v. United States*, 689 F. Supp. 854 (N.D. Ill. 1988).

The court trial was bifurcated as to the issues of liability and damages. In the liability phase of the trial, the trial judge found the United States to be liable under the Illinois Structural Work Act but did not find common law negligence on the part of the United States. In its oral decision, the court found that the United States "had charge of" the project on which Kovilic was working, ac-

[2] There was testimony at trial that Savic may have attempted to descend the ladder improperly, facing away from the building in descending it similar to a staircase. This evidence was based upon information which Nic Kovilic testified to hearing from Savic's coworkers after the accident, as well as the testimony of Emilio Spasojevic, who witnessed the final eight to ten feet of Savic's fall, and testified that he was falling face-forward. The judge found that there was no reliable evidence that Savic descended in this manner and found this evidence not to be credible. In his opinion, the trial judge stated that Savic would naturally have turned his body in mid-air in order to be facing downward as he fell, but there was no evidence of this in the record.

cording to the Illinois Structural Work Act, because the government participated in the work beyond merely owning the property or employing an independent contractor, citing *Phillips v. United States*, 792 F.2d 639 (7th Cir. 1986). The court further found that the method of attaching the ladder with nails to the building was an improper method of securing the ladder, was inadequate, and this was the proximate cause of Savic's injuries. The court also reasoned that the United States had willfully violated the Act, as the term "willful" is used under the Illinois Structural Work Act, in allowing this method of ladder attachment. Although the government inspectors' testimony conflicted on the question of whether the ladder was secured with nails or wire, both inspectors nonetheless agreed that attaching the ladder with nails would have complied with safety requirements. Despite extensive testimony in the record regarding the adequacy of the method of attachment using nails, the judge discounted the testimony of the government's expert witnesses, who testified concerning the attachment of the ladder and instead cited his "great deal of experience on ladders" as the basis for his findings.[3]

After having found liability on the part of the United States, the judge received evidence regarding Savic's damages, finding that Savic had sustained damages in the

---

[3] Specifically, the trial judge stated in his oral findings:

> "I have been a laborer in my life on more than one occasion, and as I say, even a homeowner gets a certain amount of experience with ladders. But I used ladders in the navy, I used ladders when I was a worker on the highways in the Commonwealth of Massachusetts many years ago, I washed trucks and moved things around for Rouan [sic] Motor Transport out in Iowa years ago, and I painted fences with creosote and buildings with creosote on ladders when I was a healthy young lad.
>
> I know without any difficulty at all the actions that this laborer was going through when he was attempting to get off that roof and on to that ladder."

amount of $523,087.00.[4] After subtracting the $100,000.00 which Savic received as a result of the settlement with Kovilic, judgment was entered against the United States in the amount $423,087.00. The United States appealed.

II.

DISCUSSION

This case arises under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 ("FTCA"). The law which is to be applied is the law of the State of Illinois, "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

The trial judge found that the United States was liable pursuant to the Illinois Structural Work Act, Ill. Rev. Stat. ch. 48, pars. 60-69.[5] In order to find liability under

---

[4] The judge's damage award calculation contains many assumptions unsupported in the record. Savic had been a "laborer" prior to his accident, and was paid laborer's wages at $11.87 per hour, but the judge found that his future wage would be $16.50 per hour, stating that is what "experienced roofers" were making. The record fails to set forth his basis for finding where the $16.50 per hour came from (the evidence showed experienced roofers made $16.82 per hour) nor how Savic could be classified as an "experienced roofer." In calculating Savic's earning abili[illegible]fter the injury, the judge projected his future earnings at $5.00 per hour, and again we are unaware of the source of this figure. On the other hand, Kovilic testified that he paid Savic $10 to $12 per hour for approximately fifteen weeks in 1982, the year following the accident. Kovilic stated that Savic worked as a laborer and that Savic did not have any problems doing the tasks assigned to him. At the end of fifteen weeks, Savic was laid off because the winter season prevented outdoor construction work. Savic did not return to work the following spring.

[5] Section 1 of the Structural Work Act, Ill. Rev. Stat. ch. 48, par. 60, provides, in pertinent part:

> "All scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this state for the use in the erec-

(Footnote continued on following page)

the Structural Work Act, the plaintiff must prove all of the following:

> "(1) The plaintiff was engaged in or was passing under or by a structural activity; (2) the activity was being performed with reference to a structure; (3) a scaffold or other mechanical device was being used; (4) a defect existed in the construction or use of the device; (5) the defect proximately caused the plaintiff's injuries; (6) the defendant had charge of the

---

[5] *continued*

> tion, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected or constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon."

A private cause of action arises under Section 9 of the Structural Work Act, Ill. Rev. Stat. ch. 48, par. 69, which provides in part:

> "Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure within the provisions of this act, shall comply with all the terms thereof, and any such owner, contractor, sub-contractor, foreman or other person violating any of the provisions of this act shall be guilty of a Class A misdemeanor.
>
> * * *
>
> For any injury to person or property, occasioned by any wilful violations of this Act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; and in case of loss of life by reason of such wilful violation or wilful failure as aforesaid a right of action shall accrue to the surviving spouse of the person so killed, the lineal heirs or adopted children of such person, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives."

work being performed; and (7) the defendant willfully violated the Act's safety standard."

Fisher v. Crippen, 144 Ill. App. 3d 239, 493 N.E.2d 1204, 1206 (1986) (citations omitted). On appeal, the United States disputes the district court's findings regarding whether it was "in charge of" the construction activities under the act, the defect in use which proximately caused the accident, and the government's willfulness in allowing the defective use to exist.

Findings of fact pursuant to FTCA and the Illinois Structural Work Act must be affirmed unless they are clearly erroneous. *Phillips v. United States*, 792 F.2d 639, 644 (7th Cir. 1986). A finding is clearly erroneous when, although there may be some evidence to support it, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "We may have such a conviction if the trial judge's interpretation of the facts is implausible, illogical, internally inconsistent or contradicted by documentary or other extrinsic evidence." *E.E.O.C. v. Sears Roebuck & Co.*, 839 F.2d 302, 309 (7th Cir. 1988) (citations omitted).

The lack of written findings by the district court makes review difficult. *See Jones v. Jones Brothers Construction Corp.*, 879 F.2d 295 (7th Cir. 1989). In *Jones*, this court remanded because it felt that "the district court's opinion makes review difficult because the limited number of specific findings do not sufficiently identify the evidence or credibility determinations upon which they were based and reflect certain inconsistencies." *Jones*, 879 F.2d at 297. In the present case, however, the transcript of the court's oral opinion does reflect a sufficient amount of information for us to glean the basis for the court's relevant findings in order that this court might make a valid determination of the propriety of those findings.

A.

Whether the United States "had charge of" the Project

Whether the United States "had charge of" Kovilic's roofing operation, which is the sixth element under *Fisher*, is a question of fact, to be reviewed under the totality of circumstances standard. *Gentile v. Kehe*, 165 Ill. App. 3d 802, 520 N.E.2d 827, 829 (1987). Illinois courts have determined that more than one entity can "have charge of" a project, *Fruzyna v. Walter C. Carlson Associates, Inc.*, 78 Ill. App. 3d 1050, 398 N.E.2d 60, 63 (1977), but a number of factors (10) must be considered in determining whether or not a particular defendant "has charge of" (responsibility for) the project under the parameters of the Structural Work Act.

> "These factors are: (1) supervision and control of the work; (2) retention of the right to supervise and control the work; (3) constant participation in ongoing activities at the construction site; (4) supervision and coordination of subcontractors; (5) responsibility for taking safety precautions at the job site; (6) authority to issue change orders; . . . (7) the right to stop the work; . . . (8) ownership of the equipment used on the job site; (9) defendant's familiarity with construction customs and practices; and (10) whether defendant was in a position to assure worker safety or alleviate equipment deficiencies or improper work habits."

Chance v. City of Collinsville, 112 Ill. App. 3d 6, 445 N.E.2d 39, 42 (1983) (citations omitted); *Gentile*, 520 N.E.2d at 829. The government would be found to be "in charge of" Kovilic's project if the totality of these factors weighs in favor of such a finding. As with the defendant landowner in *Gentile*, the government should not be held liable for "merely requiring compliance with the contract and insuring the quality of the work." *Id.* at 530. In *Fruzyna*, an architect was not found to be "in charge of" the contractor's work even though he was familiar

with the type of work being performed and had the right to reject work for inferior quality. *Fruzyna*, 398 N.E.2d at 66-67.

Supervision and control of Kovilic's work would require day-to-day control of the workers and the details of the work, as in *Emberton v. State Farm Insurance*, 71 Ill. 2d 111, 373 N.E.2d 1348 (1978), where the numerous daily change orders by the architect amounted to day-to-day control. Retention of this right is also significant, even if it is not exercised. Constant participation would require an ongoing presence and involvement in the day-to-day work. The very language of the contract as well as Kovilic's understanding of the situation establishes that responsibility for safety precautions rest clearly upon Kovilic and not the United States.

The government did meet the sixth and seventh elements, retaining authority to change specifications and stop work if necessary. Ownership of equipment, however, was clearly not a factor in favor of a finding that the government was in charge, because Kovilic owned and his employees operated the equipment used at the site. The government representatives were familiar with construction practices, the ninth element. However, based upon the record, it is at best highly questionable and nigh unto impossible for the government to be in a position to assure worker safety or alleviate equipment deficiencies or improper work habits (the tenth element), given that the government inspectors visited the construction site only once or twice during an ordinary work day.

The district court did make reference to some of the appropriate factors for determining whether the United States had charge of the project, referring to *Mathieu v. Venture Stores, Inc.*, 144 Ill. App. 3d 783, 494 N.E.2d 806 (1986) and *Kohutko v. Four Columns, Ltd.*, 148 Ill. App. 3d 181, 498 N.E.2d 522 (1986). Specifically, the district court said "that the government had a sufficient degree of supervision and control," because "the United States inspected the work, they oversaw the work, and in the

opinion of the court, they had a right to control the work. Whether or not that right was exercised constantly in the fullest sense of the word, I believe they did." However, the judge did not provide an analysis nor examples of what he relied upon in support of this statement. Additionally, the district court found that the government "retains the right to supervise and control," and that the government was not "constantly on location, but they were on location several times a day every day for a number of days." Even though he found that the government was not on location constantly, the judge found that the United States was "in total control of the circumstances of the base," citing the United States' ownership and general supervision of the property.[6] The testimony demonstrated that the government inspectors climbed the ladders but one or two times per day, when they wished to inspect the installation of roofing material as well as the quality of the same pursuant to the terms of the contract; and at these times they testified they took notice that the ladders were attached to the roof.

Regarding safety, the district judge cited the pre-construction conference at which safety, along with numerous other administrative details, was discussed by representatives of the government and the contractor. The government was responsible for monitoring compliance with the contract which included the ability to stop work for quality control problems; however, section 45 of the contract between the government and Kovilic placed responsibility[7]

---

[6] Using such reasoning, one could easily envision a situation where the government would be found to be "in charge of" work being performed by an employee of a private security system firm who was injured during the installation of the security system in a government building simply because of the United States' ownership and supervision of the property.

[7] The relevant portion of section 45 states:

> "(a) In order to provide safety controls for protection to the life and health of employees and other persons . . . the Contractor [Kovilic] shall comply with all pertinent provisions of Corps of Engineers Manual . . . and will also take or cause to be taken such additional measures as the Contracting Officer may determine to be reasonably necessary for the purpose."

for accident prevention upon Kovilic. In demonstrating that the government had a right to control the work, the judge cited testimony by Sherman Barnett, the Navy's project manager for this and all other construction projects at Great Lakes Naval Training Station, that he could make Kovilic change the asphalt bucket, although no evidence established that changing the asphalt bucket would be a safety precaution, rather than an aspect of quality control.[8] From this unexplained evidence, the judge came to the conclusion that "if you can stop them from using an asphalt bucket, you can certainly stop them from inadequately supporting a ladder." The district court found that the government could have stopped the work at any time, that the government was "surely and clearly familiar with construction customs and practices" related to this job because the inspectors were highly experienced in the construction industry, and that the government "did indeed have the ability to assure workers' safety" because of the inspectors' ability to "point out the lack of compliance and the necessity of complying," as provided in the contract.

The factors regarding whether a party "has charge of" a project under the Illinois Structural Work Act are aimed at determining whether a particular defendant has a depth of involvement in the project beyond mere ownership of the property or employment of the contractor, which was the case in *Phillips*. Being "in charge of" a project consists of a "continuing and substantial involvement with the work, or authority over, or responsibility for, and knowledge of the conditions which caused the injury." *Phillips*, 792 F.2d at 645. "Mere ownership, without more, is insufficient to establish liability under the Structural Work Act." *Norton v. Wilbur Waggoner Equipment Rental*, 76 Ill. 2d 481, 394 N.E.2d 403, 406 (1979). The owners in *Em-*

[8] Indeed, the record reveals that Barnett testified that the government inspectors could order the asphalt bucket changed to make a "correction on it."

berton were found to have charge of the work where they were at the work site every day, sometimes all day, attended the contractor's weekly progress meetings with subcontractors, and issued over a hundred change orders on all aspects of the project, acting over and above mere ownership or the employment of a contractor.[9] *Emberton*, 373 N.E.2d at 1352-53. In *Phillips*, the United States was not "in charge of" work on its own property when it had no idea of the progress of the work when the accident occurred or the particular methods being used in that work. *Phillips*, 792 F.2d at 645.

The United States argues, and we agree, that only three of the ten factors from *Chance* would support a finding that it was "in charge of" the work being performed by Kovilic: the authority to issue change orders, the right to stop work (*only when it does not comply with contract specifications*), and familiarity with construction customs and practices; the other seven factors applied to Kovilic. Thus, under the totality of the factors from *Chance*, we firmly believe that the United States was not "in charge of" Kovilic's roofing project, for purposes of the Structural Work Act.

As to the first two factors, the judge found that the United States had "a sufficient degree of supervision and control" for him to find that the United States "had charge of" the work, although he failed to delineate or explain his reasoning, much less the difference between "sufficient" and "insufficient." However, Mr. Barnett, the Navy's project manager, and Nic Kovilic both testified to the fact that the government did not have a right to control the work of the contractor, except when the *quality* of the work did not comply with the contract's specifications. The main duty of the inspectors was to ensure not only the quality of the material used but also compliance with the contract specifications as to installation. Although the con-

[9] In contrast, there was no testimony in this case of the government inspectors' ever submitting even a single change order.

tract mentioned safety, it clearly assigned the duty for maintaining a safe operation to the contractor Kovilic: "In order to provide safety controls . . . the Contractor shall comply with all pertinent provisions of [the] Corps of Engineers Manual . . . entitled 'General Safety Requirements.' " The United States' inspectors testified that they would only become involved with the work of the individual laborers when and if they observed immediate danger to "life and limb, where someone could get hurt," but that this situation never became necessary during Kovilic's roofing project. Otherwise, section 45 of the contract required any comments or requests for changes in the contract provisions to be channeled through the contractor's supervisor on the site. The contract required Kovilic "to have on the work [site] a competent superintendent" at all times, with authority to act for the contractor. The evidence regarding the United States' authority to enforce safety regulations and control the work, except as to quality control, established that the government did not have or retain the right to supervise and control the day-to-day work of Kovilic, and neither Savic nor the court have cited any evidence to contradict that conclusion, thus failing to support the trial court's finding as to supervision and control, as well as retention of that right, the first two factors under *Chance*.

Regarding the third factor, "constant participation in ongoing activities at the construction site," the trial judge stated "they weren't constantly on location, but they were on location several times a day every day for a number of days." The judge made no finding, however, and the evidence fails to demonstrate that the government's limited presence at the site amounted to "participation" in the work. The government's periodic inspections fail to fall within the parameters of continual supervision. Kovilic testified that the inspectors usually just "came up and talked to you . . . and asked you questions" about the activity, and that after the start of the project "they kind of slack off." In finding that the government was constantly participating in the ongoing activities at the site, the

judge reached out beyond the contractually stated responsibilities and the evidence presented. This factor cannot weigh in favor of the government being in charge of the project, for the government did not participate "constantly." Moreover, this court has previously held that government inspection of work being performed by an independent contractor is not enough to place the government "in charge of" the work. *Cannon v. United States*, 328 F.2d 763, 765 (7th Cir. 1964). The fact that the government had retained two inspectors who, from time to time, inspected the work being performed by Kovilic's employees did not place the government "in charge of" the work. This is especially so, given that the government inspectors were also responsible for making inspections of as many as twenty other work sites each day.

The terms of the contract established that the responsibility for ensuring safety precautions at the job site was upon Kovilic, the fifth of the *Chance* factors. That responsibility for safety was affirmed at the pre-construction conference. Nic Kovilic, at trial, was asked "you assumed responsibility for the safety of your employees, did you not?" Kovilic answered "yes." When asked whether the "government [had] responsibility for taking safety precautions at the job site," Mr. Barnett, the Navy's project manager, replied "no." When asked whether the inspectors had the authority to stop the project, Mr. Barnett replied that "The only way they could stop a phase of the project would be if they saw some thing unsafe [such as] in the case of endangerment of life or limb or property." Both government inspectors made similar statements. The government was not in the position to assure workers' safety because, under the terms of the contract it had delegated this responsibility to the contractor. Furthermore, we decline to hold that mere government inspection of work being performed by an independent contractor to assure that the independent contractor is following necessary safety precautions is, by itself, enough to shift the responsibility for taking safety precautions to the government. To do so would create a disincentive for the

government to ever become involved in ensuring that work by an independent contractor is performed in a safe manner.

Regarding *Chance*'s eighth factor, Kovilic owned, maintained and operated the equipment used at the job site, including the portable ladder upon which Savic was standing when he suffered his injuries.

Because seven of the ten *Chance* factors mandate our holding that Kovilic had complete safety responsibility on the roofing project, we reverse the district court's finding that the government "had charge of" the project. While the government maintained some responsibility regarding the authority to issue change orders concerning installation and quality of the material and was familiar with the construction activities as an owner, in our opinion the contract entered into between the government and Kovilic, as well as the practice on the job site, clearly placed the responsibility of safety on the contractor, Kovilic Construction Co. When asked whether he agreed with the statement "the Government would turn over the plans and specifications to you and then you were responsible for performing the work," Nic Kovilic responded "yes." Although the district court judge found some of the factors to weigh in favor of the government being "in charge of" the project (like familiarity with construction practices and the ability to issue change orders), our review of the record considered in its totality reveals that the judge erroneously found liability on the government, based upon what he referred to as his "experience on ladders." Because the evidence fails to support the trial judge's finding that the government acted above and beyond the role of a mere property owner or the hiring of a contractor, we hold that the trial judge's finding that the government "had charge of" the project for purposes of establishing liability under the Illinois Structural Work Act was erroneous.

B.

Defect in Use of the Ladder

Our holding that the United States was not "in charge of" the roofing project when Mr. Savic was injured would itself preclude a finding of liability against the United States under the Structural Work Act, but we feel that we are obligated to discuss the other grounds which compel this reviewing court to reverse the district court's finding of liability against the United States under the Act. The trial court found that the manner of securing the ladder to the roof was the defective use of the ladder which proximately caused Savic's injuries, and that the United States willfully allowed the existence of that defect. The trial court failed to recognize the defect in the use of the ladder which clearly caused Savic's injuries: *The ladder was not attached to the roof when Savic stepped upon it and fell because either Savic or his co-worker had detached it immediately prior to Savic stepping upon it and falling.* Based upon the record before us we fail to understand how the United States could be found to have willfully allowed that defect to exist.

The district court referred to three different defects in the use of the particular ladder which it felt caused the accident. First, the court felt that the method by which Kovilic secured the ladder at the top was inadequate to support the weight of the ladder and the people climbing it. Second, the court found that the ladder was not consistently secured at the bottom. Third, the court found that the ladder was too short, not extending high enough over the edge of the roof. As will be shown later, all three of these defects are immaterial (even if we agreed with the findings, which we do not) because the *proximate cause* of the accident was that the *ladder was not attached to the roof when Savic fell.* The court also found that since the United States "had charge of" the project and "willfully" allowed these conditions to exist, as that term is defined in cases under the Illinois Structural Work Act, all the necessary elements for liability under the Act were satisfied.

There is evidence regarding the three defects which the court found (the improper attachment at the top, improper attachment at the bottom, and insufficient projection above the roof), but the findings as to whether these defects existed is irrelevant because the record clearly illustrates that none of these factors caused Savic's accident. The evidence in the record establishes that Savic's accident occurred because the ladder had been detached from its moorings immediately prior to the accident and not re-attached to the roof before Savic attempted to descend. This detachment of the ladder was the defect in use which was the proximate cause of Savic's accident. Savic had been working on the roof for over two weeks, having climbed the ladder "hundreds of times" during that period, and his own testimony reveals that the ladder had never previously been detached from the roof without being immediately re-attached. Savic or his co-worker pulled the ladder from the nails which secured it to the roof in order to move the tar pipe, and failed to re-attach it. The detachment of the ladder was a defect in use, but under no circumstances can the United States be found to have willfully allowed this defect to exist because it had no knowledge of the momentary detachment and lack of re-attachment of the ladder. How the government can be faulted for an accident of this nature we are at a loss to understand.

The district court "believe[d] that the ladder was lower than it should have been in its projection above the roof," and found that this was a contributing cause of the accident. The parties stipulated that the roof was 18 feet, 8¾ inches above the ground, and that the ladder in the possession of Kovilic's insurance company was 20 feet, 1 inch in its usable length (the maximum usable length is based upon a full extension of the ladder with a safe overlap of the two sections). The plaintiff's expert based his testimony on these stipulated facts, including the measurement of the ladder, to conclude that the ladder was too

short to safely reach the height of the roof,[10] which actually may not have been the ladder used at the time of the accident.[11] Upon cross-examination, however, the expert stated that the purpose of the three-foot projection requirement was to provide a hand hold at the top of the ladder for persons getting on or off the ladder. He further testified that a violation of the regulation would not have caused the ladder to fall as Savic described it as falling because grasping a falling ladder upon which he was standing would not have prevented the fall. The trial judge relied upon the testimony of the plaintiff's expert as to the safety of the ladder as to its height in relation to the height of the roof (which had been discounted on cross-examination by a showing that the three-foot projection would not have prevented the accident), and again relying upon his own personal experience as a laborer in deciding that the violation of the three-foot projection requirement, combined with the nail method of securing the ladder, were the proximate causes of Savic's accident.

The competent testimony regarding the proximate cause of Savic's accident set forth that Savic fell because the ladder was not secured to the roof at the time when Savic stepped upon it to descend. The plaintiff Savic was the only eye-witness to the beginning of the fall, and in his testimony at trial he stated that the ladder was not attached to the roof when he started down. He further testified that he had climbed the ladder perhaps twenty to thirty times per day for two weeks and had never seen

---

[10] OSHA standards require the side rails of a ladder to "extend not less than 36 inches above the landing." 29 C.F.R. § 1926.450(a)(9).

[11] Kovilic testified that he was not certain that the ladder which he had provided to the insurance company a few months after the accident was in fact the ladder that was used by Savic at the time of the accident. Because the plaintiff's expert witness based his testimony on his inspection of a ladder that may not have been the ladder used at the time of the accident, we find it hard to understand how the trial judge gave credence to the plaintiff's expert's testimony.

it detached from the roof before. The plaintiff's expert, Charles Schulz, cited as one of three reasons for the cause of the fall, along with the projection of the ladder above the roof and the improper pitch of the ladder (both of which according to the transcript were discounted as causes on cross-examination) was the fact that the ladder was not attached at the time when the plaintiff stepped upon it to descend. Nic Kovilic, who was Savic's supervisor on the job and had asked Savic to descend to help him, testified that he saw the ladder detached by Savic or one of his co-workers when they moved the tar pipe, but that he paid no attention to whether the ladder was re-attached. He assumed that the person who detached the ladder would re-attach it.

The fact that the ladder was detached when Savic stepped upon it to descend it was the proximate cause of the accident. The trial court's finding that the method of attachment (whether adequate or not), or the height of the ladder's projection above the roof caused the accident is unsupported in the record and thus clearly erroneous.

C.

Willfulness of the United States

Since there was a defective use of the ladder, and that defective use was the proximate cause of the accident, our analysis requires a discussion of whether the violation of the Act's safety standard was a willful violation by the United States.[12] Under the Illinois Structural Work Act, "a willful violation occurs when one having charge of the work knows that a dangerous condition ex-

[12] As we mentioned previously, our holding that the United States was not in charge of the roofing project would itself preclude a finding of liability against the United States under the Structural Work Act. However, we feel it necessary to discuss the other grounds which compel a reversal of the district court's finding of liability against the United States.

ists on the [ladder] or, by the exercise of reasonable care, could have discovered the existence of the dangerous condition." *Simmons v. Union Electric Co.*, 104 Ill. 2d 444, 473 N.E.2d 946, 950 (1984); *Dickman v. Midwest Interstate Electric Construction Co.*, 143 Ill. App. 3d 494, 493 N.E.2d 33, 36 (1986); *Moore v. Clearing Industrial District, Inc.*, 64 Ill. App. 3d 391, 380 N.E.2d 1063 (1978). The trial judge based his finding of willfulness on the fact that the government had knowledge of the method of attachment and the height of the ladder, defects which we hold not causal of the accident.

The government inspectors, Skonie and Szyska, as well as Savic, Kovilic, and Emilio Spasojevic all testified that previously the ladder had always been attached when persons were climbing upon it. The only testimony at trial that the ladder may not have been attached at any time previously was the deposition testimony of Marko Letica. However, the credibility of Letica's testimony was questionable because he contradicted himself regarding whether he quit or was fired from his employment with Kovilic and the length of time he had been planning the trip which prevented him from being present at the trial. Obviously, the trial judge did not rely upon his testimony, for he made no mention of Letica's deposition testimony in his findings, but rather again relied upon his own personal experience. The judge stated, "I think they [the government inspectors] were lax and lazy, and I think that under the circumstances it all constitutes a willful" violation, apparently implying that the United States knew of dangerous conditions, was responsible for changing them and simply decided to do nothing about them. A willful violation of the Illinois Structural Work Act requires that the party "in charge of" the operation know of the defective condition: "An owner is liable where the dangerous condition is known to him or when, in the exercise of reasonable care, the existence of the dangerous condition could have been known to him." *Phillips v. United States*, 792 F.2d 639, 646 (7th Cir. 1986). We disagree with the

trial judge's finding that the government willfully violated the Act because, based on the overwhelming weight of the credible evidence, it is clear that the United States, through its agents, had no knowledge that the ladder had previously been detached from the nails when in use.

The United States did not know, nor could its agents reasonably have anticipated, that the ladder would be unattached and thus used improperly. Furthermore, Kovilic Construction was "in charge of" the project, and their actions did not depend upon the government's presence at the site: (1) Kovilic furnished the ladders, (2) Kovilic employees secured the ladders, (3) Kovilic employees detached the ladder, and (4) Kovilic employees failed to reattach the ladder. The periodic inspections of the United States' agents for quality and contract compliance cannot be expected to detect every momentary change in conditions at the work site, including each of the 20 to 30 daily ascents and descents of the ladders by Kovilic's 10 to 20 employees.

The United States did not know, and there was no reason that the United States should have known, of the momentarily defective condition in the detachment of the ladder. When there is no notice of unsafe activities, there can be no finding of liability under the Illinois Structural Work Act. *See Phillips, supra.* The district court's finding that the United States willfully allowed the defective condition which caused the accident to occur is clearly erroneous because it does not apply to the defect in use which caused Savic's accident. From our review of the record, we are unable to ascertain any willfulness on the part of the United States in allowing the existence of the defective condition which caused Savic's injury. No act or omission of the United States was a proximate cause of Tomislav Savic's injuries, but clearly, the proximate cause of the accident was the detachment of the ladder by Savic himself, or his co-worker, with the government's inspectors nowhere near the scene.

III.

CONCLUSION

"This is [another] one of those relatively rare cases in which we are left with a 'definite and firm conviction' . . . that the district judge erred in a finding of fact." *Louis Vuitton S.A. v. Lee*, 875 F.2d 584, 589 (7th Cir. 1989) (citations omitted). A finding is clearly erroneous when, although there may be some evidence to support it, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The district court judge, rather than relying upon the evidence in the trial record, relied on his own personal experience regarding the course of events which led to Tomislav Savic's fall and his subsequent injuries. We are of the opinion that the trial judge's interpretation of the evidence at trial fails to support the judge's findings dealing with the cause of the accident, while the true proximate cause of the accident was abundantly clear from the trial record. We hold that the United States is not liable under the Illinois Structural Work Act for the injuries Tomislav Savic received as a result of the fall from the ladder at Great Lakes Naval Base. The judgment against the United States is

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—11-19-90—500

APPENDIX D

Order of Court of Appeals, denying
Petition for Rehearing en Banc
January 14, 1991

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 14, 1991

Before

Hon. Harlington Wood, Jr., Circuit Judge

Hon. John L. Coffey, Circuit Judge

Hon. Jesse E. Eschbach,
Senior Circuit Judge

Tomislav Savic, Plaintiff-Appellee,	] Appeal from the] United States] District Court
No. 89-1399 v.	] for the] Northern
United States of America Defendant and Third Party, Plaintiff-Appellant,	] District of] Illinois,] Eastern] Division.
v.	] No. 83 C 5388] Brian B. Duff,
Kovilic Construction Company, Incorporated, Third Party Defendant-Appellee	] Judge

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed herein by the plaintiff-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX E

Relevant Statutory Provisions

ILLINOIS STRUCTURAL WORK ACT
Illinois Revised Statutes, Chapter 48
paragraphs 60-68

60. Scaffolds, cranes, ladders, etc. - Erection and construction

Sec. 1. All scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State of the use in the erection, repairing, alteration, removal of painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon.

Section 9 of the Structural Work Act, Ill.Rev.Stat. ch. 48, par. 69, provides in pertinent part:

> "Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure within the provisions of this act, shall comply with all the terms thereof, and any such owner, contractor, sub-contractor, foreman or other person violating any of the

provisions of this act shall be guilty of a Class A misdemeanor.

* * * * * *

For any injury to person or property, occasioned by and wilful violations of this Act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; and in case of loss of life by reason of such wilful violation or wilful failure as aforesaid a right of action shall accrue to the surviving spouse of the person so killed, the lineal heirs or adopted children of such person, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives."

29 CFR Sec. 1926 (7) (1981):

Portable ladders shall be used at such a pitch that the horizontal distance from the top support of the foot of the ladder is about one-quarter of the working length of the ladder (the length along the ladder between the foot and the top support). Ladders shall not be used in a horizontal position as platforms, runways, or scaffolds.

29 CFR Sec. 1926 (9) (1981):

The side rails shall extend not less than 36 inches above the landing. When this is not practical,

grab rails which provide a secure grip for an employee moving to or from the point of access, shall be installed.

29 CFR Sec. 1926 (10) (1981):

Portable ladders in use shall be tied, blocked, or otherwise secured to prevent their being displaced.

APPENDIX F

Construction Contract

CONSTRUCTION CONTRACT
General Provisions

1. DEFINITIONS

(a) The term "head of the agency" or "Secretary" as used herein means the Secretary, Under Secretary, any Assistant Secretary, or any other head or assistant head of the executive or military department or other Federal agency; and the term "has duly authorized representative "means any person or persons or board (other than the Contracting Officer) authorized to act for the head of the agency or the Secretary.

(b) The term "Contracting Officer" as used herein means the person executing this contract on behalf of the Government and includes a duly appointed successor or authorized representative. (DAR 7-602.1).

3. CHANGES

(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

(i) In the specifications (including drawings and designs);

(ii) In the method or manner of performance of the work;

(iii) In the Government-furnished facilities, equipment, materials, services, or site, or

(iv) Directing acceleration in the performance of the work.

9. MATERIAL AND WORKMANSHIP

(a) Unless otherwise specifically provided in this contract, all equipment, material, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade for the purpose intended. Unless otherwise specifically provided in this contract, reference to any equipment, material, article, or patented process, by trade name, make or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor may at his option, use any equipment, material, article or process which, in the judgment of the Contracting Officer, is equal to the named. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, capacity, nature and rating of the machinery and mechanical and other equipment which the Contractor contemplates incorporating in the work. When required by this contract or when called for by the Contracting Officer, the Contractor shall furnish the Contracting officer for approval full information concerning the material or article which he contemplates incorporating in the work . . .

(b) All work under the contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may, in writing, require the Contractor to remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable. (DAR 7-602.9)

10. INSPECTION AND ACCEPTANCE (1976 OCT)

(a) All work (which term includes but is not restricted to materials, workmanship and manufacture and fabrication of components) shall be subject to inspection and test by the Government at all reasonable times and at all places prior to acceptance. Any such inspection and test is for the sole benefit of the Government and shall not relieve the Contractor of the responsibility of providing quality control measures to assure . . . No inspection or test by the Government be construed as constituting or implying acceptance. Inspection or test shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance nor in any way affect the continuing rights of the Government after acceptance of the completed work under the terms of paragraph (f) of this clause, except as hereinabove provided.

(b) The Contractor shall without charge, replace any material or correct any workmanship found by the Government not to conform to the contract requirements, unless in the public interest the Government consents to accept such material or workmanship with an appropriate adjustment in

contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(c) If the Contractor does not promptly replace rejected material or correct rejected workmanship the Government (1) may, by contract or otherwise replace such material or correct such workmanship and charge the cost thereof to the Contractor, or (2) may terminate the Contractor's right to proceed in accordance with the clause of this contract entitled "Termination for Default - Damages For Delay - Time Extensions."

17. SUSPENSION OF WORK (1968 FEB)

(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

18. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (1974 APR)

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and

the date upon which such termination becomes effective.

44. ADDITIONAL DEFINITIONS (1965 JAN)

(a) Wherever in the specifications or upon the drawings the words "directed", "required", "ordered", "designated", "prescribed", or words of like import are used, it shall be understood that the "direction", "requirement", "order", "designation", or "prescription" of the Contracting Officer is intended and similarly words "approved", "acceptable", "satisfactory", or words of like import shall mean "approved by" or "acceptable to" or "satisfactory to" the Contracting Officer, unless otherwise expressly stated.

(b) Where "as shown", "as indicated", "as detailed", or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise. The word "provided" as used herein shall be understood to mean "provided complete in place," that is "furnished and installed." (DAR 7-602.41)

45. ACCIDENT PREVENTION (1977 JAN)

(a) In order to provide safety controls for protection to the life and health of employees and other persons; for prevention of damage to property, materials, supplies and equipment, and for avoidance of work interruptions in the performance of this contract, the Contractor shall comply with all pertinent provisions of Corps of Engineers Manual, EM 3M5 1-1, dated 1 June 1977 entitled "General Safety

Requirements", as amended, and will also take or cause to be taken such additional measures as the Contracting Officer may determine to be reasonably necessary for the purpose.

(b) The Contractor will maintain as accurate record of, and shall report to the Contracting Officer in the manner and on the forms prescribed by the Contracting Officer, exposure data and all accidents resulting in death, traumatic injuries, occupational disease, and damage to property, materials, supplies and equipment incident to work performed under this contract.

(c) The Contracting Officer shall notify the Contractor of any noncompliance with the foregoing provisions and the action to be taken. The Contractor shall, after receipt of such notice, immediately take corrective action. Such notice, when delivered to the Contractor or his representative at the site of the work, shall be deemed sufficient for the purpose. If the Contractor fails or refuses to comply promptly, the Contracting Officer may issue an order stopping all or part of work until satisfactory corrective action has been taken. No part of the time lost due to any such stop orders shall be made the subject of claim for extension of time or for excess costs or damages by the Contractor.

(d) Compliance with the provision of this article by subcontractors will be the responsibility of the Contractor.

If the contract involves more than 6 months work or is described as hazardous character in the invitation for Bids, Schedule, or Specifications, the following paragraph (e) will apply.

(e) Prior to commencement of the work the Contractor will

(1) submit in writing his proposals for effectuating this provision for accident prevention.

(2) meet in conference with representatives of the Contracting Officer to discuss and develop mutual understandings relative to administration of the overall safety program. (DAR 7-602.42)

46. GOVERNMENT INSPECTORS (1965 JAN)

The work will be conducted under the general direction of the Contracting Officer and is subject to inspection by his appointed inspectors to insure strict compliance with the terms of the contract. No inspector is authorized to change any provision of the specifications without written authorization of the Contracting Officer, nor shall the presence or absence of an inspector relieve the Contractor from any requirements of the contract. (DAR 7-602.43)

69. GOVERNMENT REPRESENTATIVES (6-72)

(a) The work will be under the general direction of the Contracting Officer, the Commander, Naval Facilities Engineering Commander, who shall designate an officer of the Civil Engineer Corps, United

States Navy, or other officer or representative of the Government, as Officer in Charge of Construction, hereinafter referred to as the "OICC", who except in connection with the "Disputes" clause shall be the authorized representative of the Contracting Officer and under the direction of the Contracting Officer have complete charge of the work, and shall exercise full supervision and general direction of the work, so far as it affects the interest of the Government. For the purposes of the "Dispute" clause the Contracting Officer shall mean the Commander, Naval Facilities Engineering Commander; the Acting Commander, their successors, or their representatives specially designated for this purpose.

(b) The provisions in this clause or elsewhere in this contract regarding supervision, approval or direction by the Contracting Officer or the OICC or action taken pursuant thereto are not intended to and shall not relieve the Contractor of responsibility for the accomplishment of the work either as regards sufficiency or the time of performance, except as expressly otherwise provided herein.

94. WORK OUTSIDE REGULAR HOURS (6-72)

If the Contractor desires to carry on work outside regular hours or on Saturdays, Sundays, or holidays, he shall submit application to the Officer in Charge of Construction, but shall allow ample time to enable satisfactory arrangements to be made by the Government for inspecting the work in progress. At night, he shall light the different parts of the work in an approved manner. All utility cutovers shall be made

after normal working hours or on weekends. Anticipated costs shall be included in the bid.

APPENDIX G

Excerpts of Letica's Testimony

Excerpts of Letica's Testimony

Q. Okay. Now the ladder that's depicted in Exhibits 1 and 2 for the week prior, for the week before Mr. Savic fell, does that photograph truly and accurately depict how high above the canopy the top of the ladder extended?

MR. FLESSNER: Objection, foundation.

WITNESS: A. How high the stepladder extended?

MR. MARTINOVICH: Yes.

A. It extended approximately, well it was below my knee level and I had to bend down to - In order to grab the stepladder before I can get, before I can step onto the roof or the steps if I was going up or down. It looks approximately this high.

MR. MARTINOVICH: Q. This high?

A. Probably maybe a few inches different.

Q. Prior to Mr. Savic's injury and fall, did you have occasion to see the ladder or a ladder that appears like the ladder in Exhibit 2 fastened at all?

A. Yes, on occasions, not all the time. I don't remember if it was attached on all the time.

I do remember personally that when I was going up on the roof, and once in a while it would be

windy, and if you - I used to carry felt paper and different equipment onto the roof and tools --

A. And the stepladder was shaking at times and you had to be very careful before you could step onto the roof without slipping and falling.

Q. Previously you testified that the ladder before Mr. Savic's fall was secured occasionally. Can you please tell us what you mean by occasionally.

A. Occasionally, well sometimes when we're working, they're working fast and they move from one position to another and in a hurry to get started we don't usually anchor them right away. I remember occasions when they were not.

Q. Do you know who Jim Skonie is?

A. Yes, inspector who came by, checked out the work. Yes, I seen him almost every day.

Q. Was he ever present when the ladders were unfastened?

A. I believe he was.

MR. GRANEY: Objection to that question and that response, in that the time period is not set. Whether it has any relevance to this accident, the fact it doesn't relate, but it was on the day of the accident or week before or month before or year before.

MR. MARTINOVICH: Thank you for clarifying.

Q. At any time before Mr. Savic fell, was Mr. Skonie present when the ladder was not fastened?

WITNESS: A. Yes.

APPENDIX H

Excerpts of Syska's Testimony

Q. And from when to when did you do the consulting for the Navy?

A. We started in 1981, and I was there -- In fact, we're still there, and I was there through 19, July of 1983.

Q. And were you there at the inception of 1981?

A. Yes.

Q. And the name of your company again?

A. Project Control, Incorporated. Actually it was 1980. Excuse me. It was 1980.

Q. And were you the only person that actually did work on behalf of the United States Government or the Department of Navy through Project Control?

A. Yes, at that time, yes.

Q. And what exactly were your duties in 19, from 1980 to the time you quit?

A. I was the inspector of the roofing operations, the quality control. I was in charge of quality control and had some duties as, some dealings with the safety of the projects just as a standard citizen would.

Q. In your duties as inspector of roofing, what did that involve?

A. Check the quality; make sure all the products that were specified by the United States Navy were being installed; that they were being installed properly; that they were getting the amounts specified as far as liquid bitumens and the number of sheets called for and the type of insulation that was called for; that all the material, old materials were being removed from the site, and wood blocking put back in its place. It's everything to do with the roof.

Q. And that also would be true of the quality control? That would encompass what you just described?

A. Right.

Q. Relative to the safety, were you ever given instructions by the Government relative to any safety?

A. To watch out that the people were following OSHA and the Corp of Engineer Safety Regulations.

Q. And were you provided with those regulations, or were those regulations that you were well familiar with?

A. I was well familiar with them.

Q. Was there a safety inspector that was assigned to the job site that you were familiar with?

A. We were all safety inspectors as such.

Q. All of you had equal duties?

A. Pretty much so, yes.

Q. Same authority in terms of stopping the job?

A. I didn't have the authority, but the Navy personnel did. I could make the recommendation to the Navy.

Q. And who is the Navy -- Who were the people in the Navy who had the authority to stop the job while you were there in August of 1981?

A. Sconi, Barnett. If they gave us permission, we could go out there and stop the job, and Mr. Stall.

APPENDIX I

Excerpts of Sconie's Testimony

Q. Now, one of your duties in August 1981 was also a Safety Inspector, was it not?

A. Correct.

Q. And in fact, you participated in the pre-construction conference involving safety with Mr. Kovilic, Mr. Barnette and Mr. Cisca, did you not?

A. If I remember correct, I participated with them.

Q. Okay, do you recall participating in the preconstruction conference regarding safety with Mr. Kovilic?

A. No.

Q. As a safety inspector, what was your understanding as to what your duties were?

A. To see that the contractor complied to the Corps of Engineer Safety Manual.

Q. As well as OSHA standards?

A. As well as OSHA standards.

Q. Because OSHA is one of the things that's required in the preconstruction conference, isn't that correct?

A. I believe so.

Q. And what was your powers, as you found that they didn't comply with OSHA or the Corps of Engineer standards?

A. If it was life and limb where someone could get hurt, you could thoroughly stop the job.

Q. Have you ever had occasion to do that in your career with the Navy?

A. Oh yes.

Q. What else was your understanding as to what your power was?

A. You are to get that corrected immediately.

Q. You had the authority to, if you saw a worker doing something unsafe, to tell that worker to stop and tell them to correct it?

A. Yeah, if it was a matter of that guy getting hurt immediately, you go and tell him. If it's a matter of mistake or something, you go see the superintendent or the foreman or whoever and tell him, you know. But if that guy was going to get hurt doing something, you would definitely --

Q. You would stop them.

A. --stop them, try to.

Q. What else, if any, what other powers did you have?

A. Power, I don't understand, what do you mean?

Q. You know, what other rights did you understand to have when you saw a safety violation, other than stop the job and stop the individual, if there are any other rights you thought you had?

A. To get the correct, to get the problem solved immediately.

APPENDIX J

Excerpts of Savic's Testimony

Q. As you stepped on the ladder, what did you notice about the ladder, if anything?

A. I had a feeling that the ladder was sinking.

Q. Can you describe to us, please, how you got on the ladder?

A. The roof was level, the ladder was leaning against the roof. I was coming from the right side. I stepped with my left foot on the rung of the ladder. As I was stepping with my left foot I was trying to grip the ladder with my right hand, but I didn't manage to get hold of the ladder and fell down.

Q. What position was your body in when you went to grab the ladder?

A. I was turned towards the roof.

Q. Where was the height of the ladder relative to any part of your body?

A. It was low.

Q. Can you tell us in relation to your body, for instance, was it below or above your knee, if you recall?

A. Below the knee.

THE COURT: How high was it above the roof?

THE INTERPRETER: I am still trying to repeat the questions.

He didn't answer the question, he repeated what he said before, it was below the knee.

THE COURT: No. Ask him my question.

Did the ladder come above the roof?

THE WITNESS: Yes, it was.

THE COURT: How high.

THE WITNESS: About this much (indicating).

THE COURT: 12 to 15 inches by demonstration.

APPENDIX K

Excerpts of Kovilic's Testimony

Q. Now, before Mr. Savic fell you had daily contact with the inspectors from Great Lakes, is that correct?

A. Yes. I mean, you know, they come by all the time, you know, to check up on you and stuff.

Q. In fact, Mr. Scony would appear about three or four times a day, right?

A. Right.

Q. And Mr. Siska about an additional three or four times a day?

A. Right.

Q. I take it you had occasion to see the Government inspectors Scony and Siska there while you were there?

A. Yes. I mean, you know, they came up and talked to you and, you know -- I mean, they see what you're doing and ask you questions.

Q. And before Savic was there you were there every day, isn't that correct?

A. Right.

Q. And you were there all day long when the workmen were there, is that correct?

A. Yes.

Q. And on those seven or eight occasions that the Government inspectors showed up every day you saw them, is that correct?

A. Yes.

Q. Now, sometime prior to the end of the year 1981, did you -- did anybody ask you for the ladder that was involved in the fall with Mr. Savic?

A. What's the dates?

Q. Somewhere before the end of 1981 did someone ask you for the ladder that was involved in Mr. Savic's fall?

A. Well, the insurance company asked for it. I don't know when that was, though.

Q. And Mr. William Wallrab was a representative for the insurance company, isn't that correct?

A. Yes.

Q. And he came to your shop and he asked you for the ladder that was involved in the fall, isn't that correct?

A. Yes.

Q. And you went and -- tell us what you did when he asked you that.

A. Well, he had a couple of young guys with him with a van and, you know, they wanted to get this ladder and we went to the shop. You know, there was a bunch of stuff there and I picked out a ladder and I gave it to them.

Q. And did you give them the ladder you believed was involved in the fall?

A. Yes.

Q. Now, it wasn't until four years after you gave the insurance company the ladder that it first came to your mind that you might have given the insurance company the wrong ladder, isn't that right?

A. Well, in those, whatever, three years between nobody ever raised the question and I never thought about it.

Q. Okay. You didn't really think about it until late 1985, is that correct?

A. Right, when I was asked.

Q. That's after tests were run and it was determined that the ladder might not have met OSHA standards, isn't that right?

A. No. I mean, I don't know that tests were run or anything.

Q. But it came to mind after your attorneys talked to you, isn't that right, or talked to your father?

A. No.

Q. When did it first come to mind, Mr. Kovilic?

A. As far as I remember, there was talk -- I don't know who said it or what -- that the ladder that I had given was too short to reach the roof.

Q. There was talk. What do you mean by "talk"?

A. Well, you know, somebody might have said something -- I mean, an attorney might have said something or my father might have said something or, you know.

Q. And after this talk you just couldn't find the matching ladder so you concluded that somehow or other the ladder you gave was not right, right?

A. Yes.

Q. And that's the only reason you think that, is that right?

A. Yes.

Q. Isn't it possible that over those four years you could have lost the matching ladder?

A. Yes, I mean, sure, you could use a lot of ladders.

Q. It could have been misplaced, right?

A. Yes, and they get stolen on jobs.

APPENDIX L

Excerpts of Barnett's Testimony

Q. You say the Government could order a contractor, Mr. Kovilic in particular, to remove a piece of broken equipment such as a broken ladder?

A. Oh, definitely.

Q. And they had the authority to require Mr. Kovilic to remove any piece of equipment that they felt was defective?

A. No, their reference here is to ladders only. That's in the Corps of Engineers Safety Manual.

THE COURT: What about the asphalt tank, could they make them remove that if they thought it was defective?

THE WITNESS: We could stop them from using it for making any kind of correction on it.

Q. Did the Government also go by every day and make sure the job was left in a clean manner?

A. That would be one of their collateral duties.

Q. And if it wasn't, they would cite the contractor, right?

A. They would notify the contractor. They wouldn't necessarily cite him, they would notify him. Then if he didn't clean it up, then they would give him a noncompliance notice.

Q. And ultimately, if noncompliance notices are not met the job gets stopped, is that right?

A. If it is repeated and repeated, it could probably be stopped.